Supreme Court, U.S.
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No. 92-418

In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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ARGUMENT

The Petition Was Timely Filed; The Court Of Appeals Treated Paradis' Pleading As A Petition For Rehearing

Respondent, Donald Paradis, asserts in his brief opposing a Writ of Certiorari that because he filed only what he called a "Suggestion for Rehearing En Banc," and not a petition for rehearing, the ninety-day period for filing a Petition for a Writ of Certiorari began running January 23, 1992, when the panel opinion was issued, and not on June 9, 1992, when the Court of Appeals issued an order denying *both* rehearing and a hearing *en banc*.

The Court of Appeals plainly treated Paradis' pleading as both a Petition for rehearing and for an en banc hearing. For one thing, the court said it had done so. The order denying rehearing reads:

> The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges and [sic] Alarcon and Beezer have voted to reject the suggestion for a rehearing en banc. Judge Nielsen would so recommend.
>
> The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).
>
> The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. App. 2, Petition.

In addition, the court's mandate was not issued until June 27, 1992, indicating plainly that the Court of Appeals understood that a petition for rehearing had been filed. See Rule 35 (c), Rules of Appellate Procedure (Pleading

limited to suggestion for en banc hearing does not stay mandate.) It is the practice of the Court of Appeals to treat all suggestions for rehearing en banc as petitions for rehearing. The internal operating procedures of the court provide:

> If a suggestion for rehearing en banc has been made, the panel will first make known to the other members of the Court its decision to deny rehearing, and its recommendation with regard to the en banc suggestion. II K. (2) (b), Statement of Internal Operating Procedures, United States Court of Appeals for the Ninth Circuit, (1983).

The fact that the Court of Appeals treated Respondent's pleading as a petition for rehearing, and thereby withheld its mandate until June 27, 1992, controls the question submitted and establishes that the jurisdictional date for filing the petition was ninety days from June 9, 1992, the date of denial of rehearing. In *Missouri v. Jenkins*, 495 U.S. 33 (1989), a case considering this issue, the Court found dispositive the fact that the Court of Appeals had treated a document denominated "Petition for Rehearing en banc" as a petition for rehearing and had in the meantime stayed its mandate.

> If the Eighth Circuit had regarded the State's papers as only a suggestion for rehearing in banc, without a petition for panel rehearing as well, Rules 35(c) and 41(a) of the Federal Rules of Appellate Procedure would have required the court to issue its mandate within 21 days of the entry of the panel's judgment. The Court of Appeals did not issue the mandate within 21 days of the panel's judgment, but issued it only upon its October 14 order denying the State's petition. Nor did the Court of Appeals issue an

> order extending the time for issuance of the mandate, as it may do under Rule 41(a).
>
> . . . We presume that the Eighth Circuit withheld the mandate because, under Rule 41(a), it must do so when a petition for panel rehearing is pending. 495 U.S. at 48-49.

The Court also noted a preference for the practice of circuits that have published rules giving notice that all suggestions for rehearing en banc will be treated as containing both petitions for rehearing and suggestions for hearing en banc.

The practice followed by the Court of Appeals was particularly appropriate in this case. The text of Respondent's "suggestion for rehearing en banc" contained material appropriate to a petition for rehearing. As the rules make clear, a suggestion for rehearing en banc is addressed to a rarely granted power of the court. An en banc hearing is generally not granted unless necessary to secure or maintain uniformity of decisions within the Court of Appeals or to resolve questions of exceptional importance. Rule 35, Rules of Appellate Procedure. A suggestion for rehearing en banc is not an appropriate vehicle for challenging the panel's interpretation of facts or ordinary legal errors that may be part of its opinion. *Id.* Respondent's pleading, which is appended to his response to the petition for certiorari, contained just such matter and put the Court of Appeals on notice that he was seeking relief in the nature of a rehearing.

CONCLUSION

The Petition for a Writ of Certiorari was timely filed within ninety days of the denial of rehearing.

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